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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407.

STEPHEN A. SULENTICH,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	3
The Alleged Accident	3
Petitioner's Previous History of Back Trouble	4
Petitioner's Fraud	5
Disposition in the Lower Courts	8
Argument	9
Uniformity of Decision Is Not Disturbed by the Holdings Below on the Effect of Petitioner's Fraud	10
All Issues of Negligence Tendered by Petitioner Were Put to the Jury	15
Since Petitioner Failed to Challenge the Trial Court's Finding That He Was Not Injured on the Mills, No Basis for Review Was Presented	17
Conclusion	18
APPENDICES:	
1. Opinion of the District Court Denying Petitioner's Motion for a New Trial and Denying Petitioner Maintenance and Cure	19
2. Findings of Fact and Conclusions of Law of the District Court	24
3. Instruction Submitted by the Trial Court to the Jury	27

TABLE OF AUTHORITIES.

Cases.

Bigelow v. Nickerson, 70 F. 113 (C. A. 7—1895) 14

Casso v. Penn. R. R. Co., 219 F. 2d 303 (C. A. 3—1955) 10

Cosmopolitan Company v. McAllister, 337 U. S. 783 (1948) 13

Ferguson v. Moore-McCormack Line, Inc., 352 U. S. 521 (1957) 15

Fink v. Shepard Steamship Co., 337 U. S. 810 (1948) 13

McAllister v. U. S., 348 U. S. 19 (1954) 17, 18

Minneapolis R. Co. v. Borum, 286 U. S. 447 (1932) 10, 11, 12, 13

Minneapolis R. Co. v. Rock, 279 U. S. 410 (1928) 10, 11, 12, 13

Payne v. Daugherty, 283 Fed. 353 (C. A. 8—1922) 12

Rock v. Minneapolis R. Co., 247 Ill. App. 600 (1928) 12

Rogers v. Missouri Pacific R. Co., 352 U. S. 500 (1957) 15

Southern Pacific Company v. Libbey, 199 F. 2d 341 (C. A. 9—1952) 10

Talarowski v. Pa. R. R. Co., 135 F. Supp. 503 (D. C. Del.—1955) 11

Warren v. U. S., 340 U. S. 523 (1951) 14

Annotation.

136 *A. L. R.* 1125 12

Statutes.

Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. § 51, § 55) 3, 12

Jones Act (38 Stat. 1185; 46 U. S. C. § 688) 3

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The opinion of the Court of Appeals is reported at 257 F. 2d 316 and is printed in the petition (Appendix A. p. 5a).

Denial of Petitioner's petition to the Court of Appeals for rehearing was without opinion.

JURISDICTION.

The jurisdictional requirements are accurately set forth in the petition.

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Ferguson v. Moore-McCormack Line, Inc., 352 U. S. 521 (1957) 15

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McAllister v. U. S., 348 U. S. 19 (1954) 17, 18

Minneapolis R. Co. v. Borum, 286 U. S. 447 (1932) 10, 11, 12, 13

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QUESTIONS PRESENTED.

The statement of "Questions Presented" contained in Petitioner's brief (p. 2) does not accurately reflect the issues tendered below. We believe the questions presented must, in fairness, be restated as follows:

1. This Court has held and lower courts have followed the rule that one who procures his employment by deliberate fraud in regard to employment physical examination is not, as of right, an employee entitled to sue for a subsequent injury provided that his fraud was material and substantially affected the examining doctor's conclusion that he was in acceptable physical condition. Were the lower courts correct in holding that this rule applied when the employment physical examination at which the fraud was practiced occurred after the person had started to work, but before the alleged injury and where it was shown that the employment was expressly subject to passing of such examination, that such examination was held as soon as practicable, and that the employer relied upon such examination?

2. When it was shown that under the evidence the instructions given the jury on the issue of negligence were adequate and that in regard to other alleged incidents of negligence there was no evidence to support them or no offer to prove them and no instructions requested to submit them, was the Court of Appeals correct under decisions of this Court in holding that the case was submitted in proper form to the jury?

3. When Findings of Fact dispositive of the claim were made by the trial court sitting in admiralty without a jury and on appeal from such judgment and from a judgment on the jury branch of the case such findings were not challenged at all, was the Court of Appeals cor-

rect in affirming the non-jury case without review and deciding the question of law common to both appeals in its review of the jury case?

STATUTES INVOLVED.

The statutes involved are the Jones Act (38 Stat. 1185, 46 U. S. C. § 688) and the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. § 51, § 55), both printed in the petition (Appendix A, p. 1a).

Petitioner states that a treaty is involved, the Shipowners Liability Convention (54 Stat. 1693) printed in the petition (Appendix A, p. 3a) but respondent contends that said treaty is not involved. It was never urged in the trial court and was not raised in the Court of Appeals until after oral argument and then by means of a supplementary brief, leave to file which was denied.

STATEMENT.

THE ALLEGED ACCIDENT.

Petitioner had gone to college and had graduated from law school. He went on the Steamer MILLS in July of 1953 so he could study for a bar examination and work at the same time (R. 56).

He was assigned as a coalpasser and as such stood two 4-hour watches in every 24 hour period. Coal was conveyed from the coal bunkers to the furnace by automatic stokers. Petitioner assisted the fireman by shoveling ashes into a hole on the deck from which the ashes were automatically conveyed over the ship's side into the water.

There were no eye witnesses to the accident claimed by Petitioner. He said that on August 17, 1953, he was going down a stairway from the engine room to the crank room carrying a mop pail in one hand and when about

half way down slipped on a tread and fell, injuring his back.

The treads of the stairway were solid metal and each was covered by an abrasive safety pad which Petitioner testified reached to a point 1" to 2" from the edge of the step (R. 64). He testified that the abrasive material was wet and oily (R. 65) and that the edges of the treads were worn down so that they were smooth and shiny (R. 63).

The engineer on watch heard a noise as if something metallic had fallen, went to the top of the stairs and saw Petitioner lying against the stairs (R. 450). Petitioner got up himself and the engineer went down and talked to him (R. 451)—he said he had slipped on the stairs. The engineer examined the treads, saw they were in good condition (R. 451) and that the steps were dry (R. 451).

The oiler on watch (who was called as a witness for Petitioner) used the stairway about a dozen times during the watch and admitted he noted nothing unusual about the stairs. The treads looked good (R. 430)—he didn't see any bad treads on there (R. 431).

All witnesses except Petitioner testified that the non-skid safety pads on the treads extended to a point ¼" to ⅛" from the edge of the treads (R. 430, 451).

PETITIONER'S PREVIOUS HISTORY OF BACK TROUBLE.

Following the alleged accident of August 17, 1953, Petitioner's condition was diagnosed as a herniation of lumbar discs 4-5 (R. 428).

Petitioner told the doctor who treated him in Duluth following the alleged accident that he had had no back trouble previous thereto (R. 427). He told the same thing to the U. S. Public Health Service doctor who next treated him, that he never had any back trouble before August 17, 1953 (R. 469, 494).

As early as 1942 Petitioner had a post-operative diagnosis of possible herniated disc (R. 486) and in 1950 a definite diagnosis of ruptured disc lumbar 4-5 had been made (R. 482), the same place as after the alleged accident.

Actually at the time of the alleged accident Petitioner was receiving compensation based on a 30% disability of the back. He had been discharged from Military Service because of back trouble.

Petitioner's "long history of chronic back trouble" is detailed in the Trial Court's Finding of Fact 2 (Appendix 2, p. 24, *infra*).

PETITIONER'S FRAUD.

In April, May and June of 1953 Petitioner was having back pain and was receiving treatments therefor. In July he joined the Steamer MILLS at Two Harbors, Minnesota.

The navigation season on the Great Lakes is restricted to the period from early spring to late fall. Before the MILLS sailed in the spring of 1953, respondent arranged for physical examinations of the entire crew in order to determine their fitness for employment.

During the course of the navigation season there was some change of personnel--a seaman may leave his ship on short notice or no notice at all and a replacement must be found (or sought) in a short time because vessels such as the MILLS are ordinarily never in port more than a few hours.

Physical examinations of those seamen joining vessels after the opening of navigation were conducted aboard ship on respondent's behalf by a doctor stationed at the Port of Duluth, Minnesota. Duluth is the most frequented port on the Great Lakes for vessels in the iron ore trade and was visited by the MILLS on the average of twice a

month. If the doctor found a seaman unfit for employment he notified the captain of the vessel, who then paid the seamen off and gave him his fare home (R. 296, 440).

Upon coming aboard ship a seaman signs the Ship's Articles. Petitioner signed Articles on the Steamer MILLS on two occasions (R. 203, 441). The Articles provided in substance that employment was subject to health examination by a physician furnished by the vessel and that in case any crew member failed to pass such examination his employment would cease (Finding of Fact 1, Appendix 2, p. 24, *infra*).

It so happened that after Petitioner joined the Steamer MILLS she did not receive orders for loading ore at Duluth until August 15, at which time the examining doctor came aboard and conducted a physical examination of Petitioner and several other seamen who had recently joined the ship. Previous to actual physical examination the doctor asked in substance the following questions among others provided for in the Health Examination Report, and Petitioner gave the following answers (R. 307):

> "Q. Have you ever had back pain?
>
> A. No.
>
> Q. Were you ever rejected or discharged from Military Service and, if so, why?
>
> A. No.
>
> Q. Did you ever receive compensation from any source for sickness or accident?
>
> A. No."

Petitioner then signed the examination reports in the following form (R. 308):

> "I hereby certify that I have disclosed all previous sickness and injury and I am in good health. I also authorize the examining physician to send this report to the employer.
>
> /s/ Stephen A. Sulentich."

On this subject Petitioner testified as follows (R. 212, 214):

"Q. And at the time you were taking that examination, Mr. Sulentich, you knew that you had had previous pain in your back before you ever came aboard-ship?

A. Yes.

Q. And you knew that you had injured your back at Reliance Electric Company?

A. I had a strained condition there, yes, muscle

* * * * *

Q. You knew, however, Mr. Sulentich, that over a long period of time—and I am speaking of your knowledge at the time you were having this physical examination—that you had received medical treatment for your back from the Veterans Administration?

A. Yes, I did.

* * * * *

"Q. And you knew furthermore that you were receiving a compensation from the Veterans Administration based on a thirty percent disability?

A. That is right.

Q. And you knew further that you had had attacks of back pain and diathermy and medication for this condition as recently as April, May and June of that year?

A. Well, I had it that year, but I do not know exact dates; treatment, yes.

Q. Now, did you disclose any of these conditions to the examining doctor?

A. No. I did not."

Since Petitioner gave no history of back trouble the doctor did not conduct a rigid examination of his back (R. 298, 310) and on the basis of the minor defects found he was rated "B" or fit for employment.

However, if Petitioner had disclosed in substance the true facts concerning his history of back trouble, the examining doctor stated that he would have rated him "D" or unfit for employment and would have brought about his immediate discharge from the ship (R. 315, 316, 296, 440).

DISPOSITION IN THE LOWER COURTS.

Jury trial of the Jones Act claim commenced March 7, 1957 and resulted on March 22 in a verdict for respondent.

Three main issues were put to the jury: (1) Was Petitioner injured at all on the Steamer MILLS? (R. 394, 401); (2) Was Respondent negligent? (R. 395, 396); and (3) Was Petitioner's employment invalidated prior to the date of the alleged accident because of fraud? (R. 397).

On May 13, 1957, a hearing was held before Judge Barnes, without a jury on Petitioner's claim for maintenance and cure and such claim was denied in an oral opinion (Appendix 1, *infra*, p. 19) on the grounds that:

(1) Petitioner sustained no injury aboard the Steamer Mills (Finding of Fact 7, Conclusion of Law 2, Appendix 2, *infra*, p. 26).

(2) Petitioner's employment on and after August 15, 1953 was procured through fraud and misrepresentation and was, therefore, void (Finding of Fact 6, Conclusion of Law 1, Appendix 2, *infra*, p. 26).

The Court of Appeals unanimously affirmed, holding in respect to the questions now sought to be certified that:

(1) The judgment of the Trial Court on the maintenance and cure count is affirmed for the reason that the Petitioner did not challenge its basis in his appeal briefs.

(2) The instructions submitted to the jury on the question of Petitioner's fraud contained all of the essential elements necessary to warrant a finding under respondent's affirmative defense, was a correct statement of the law, and was properly given under the evidence in the record.

(3) The instructions submitted to the jury on the question of negligence were sufficient under the evidence in the record, and since the Trial Court did not withdraw from the jury any issue of negligence properly tendered by Petitioner under Rule 51 F. R. C. P., the doctrine of the *Rogers* case, 352 U. S. 500, was not involved.

(4) Petitioner had a fair trial free from prejudicial error.

ARGUMENT.

No review is warranted. The holding of the lower courts regarding the effect of Petitioner's deliberate fraud is consonant with decisions of this Court and with *all* decisions of lower federal courts rendered since the time of this Court's decisions. Petitioner's statement that issues of negligence were improperly withdrawn from the jury is flatly contradicted by the holding of the Court of Appeals that all issues of negligence tendered by Petitioner were submitted to the jury. Finally, since the Trial Court based its denial of maintenance and cure on the independent Finding of Fact that Petitioner was not injured aboard the Steamer MILLS (as well as on the ground that his employment was invalidated by fraud), and since Petitioner failed to show on appeal that such fact finding was "clearly erroneous" (or indeed to challenge such finding at all), the Court of Appeals was correct in affirming the judgment.

Further, Petitioner fails to make out a case of general importance justifying review by this Court. Although the

alleged accident was commonplace, the background thereof was most unusual, if not unique, and unlikely to occur again. We submit it is not a recurring problem in the administration of justice, on land or sea, that a law student suffering from back trouble diagnosed as herniated disc for which he is receiving compensation based on a 30% disability decides to continue his law studies aboard ship and to work at the same time, and while aboard deliberately conceals his true physical condition from an examining doctor, and then allegedly (but unwitnessed) has a fall in which the only injury found is the self-same herniated disc, the past history of which he then proceeds to conceal from the doctors who treat him.

UNIFORMITY OF DECISION IS NOT DISTURBED BY THE HOLDINGS BELOW ON THE EFFECT OF PETITIONER'S FRAUD.

The Court of Appeals held that the instruction submitted by the trial judge to the jury (Appendix 3, herein) correctly stated the law, contained all the necessary elements to warrant a finding under respondent's affirmative defense and was properly given under the evidence. This holding is directly supported by this Court's decision in *Minneapolis R. Co. v. Rock*, 279 U. S. 410 (1928) as explained in *Minneapolis R. Co. v. Borum*, 286 U. S. 447 (1932), where it was held that "one who procures his employment by fraud is not entitled to the benefits of the Employers' Liability Act * * * providing the false statement was of such character that it 'substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition.'" *Southern Pacific Company v. Libbey*, 199 F. 2d 341, 348 (C. A. 9—1952), which statement of law was approved in *Casso v. Penn. R. R. Co.*, 219 F. 2d 303, 304 (C. A. 3—1955), and

applied in *Talarowski v. Pa. R. R. Co.*, 135 F. Supp. 503 (D. C. Del.—1955).

Plaintiff in the *Rock* case, *supra*, was, of course, an imposter, having hired a substitute to take the physical examination for him, but that the Court did not mean to rest its ruling in that case on such a narrow footing is made clear by the opinion in the *Borum* case (*Minneapolis R. Co. v. Borum*, 286 U. S. 447 (1932) *supra*). It was on the question of the *materiality* of the fraud *not the manner in which the fraud was practiced* that the *Borum* case turned and which distinguished it from the *Rock* case. Justice Butler, who wrote the opinion in both cases, held in the *Borum* case, "defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any *material* bearing upon the physical condition it required" (286 U. S. 450) and that "the evidence does not show that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition, or that if he had given his real age the surgeon would have found otherwise" (286 U. S. 450); and that "Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees." (286 U. S. 451.)

By way of contrast, in order to show the materiality of the misrepresentation in the *Rock* case, Justice Butler referred to the following language from his earlier opinion: "While his (Rock's) physical condition was not a cause of his injuries, *it did have direct relation to the propriety of admitting him to such employment* * * *." (286 U. S. 450.)

These decisions make clear that the only test of materiality is whether the misrepresentation affected the

examining doctor's conclusions that the man was in acceptable physical condition. In our case the trial court applied this test and submitted to the jury the issue of materiality of plaintiff's misrepresentation (R. 397), a point clearly emphasized in the Court of Appeals' opinion (259 F. 2d p. 320).

While the requirement intimated in the annotation 136 *A. L. R.* 1125 cited at p. 9 of Petitioner's brief that there be a causal connection between the previous condition and the injury sustained goes beyond the requirements laid down by this Court in the *Rock* and *Borum* cases, it is clear that in the present case the existence of a causal relationship between Petitioner's physical condition prior to the alleged accident and his condition thereafter, was established as an undisputed fact; indeed the conditions were identical as pointed out in our Statement herein, *supra* (pp. 4-5). Even the doctor who testified for Petitioner admitted he had a vulnerable and weak back likely to be injured again (R. 435) and his counsel so stated to the jury (R. 496).

Petitioner cites the discredited case of *Payne v. Daugherty*, 283 Fed. 353 (C. A. 8—1922) in support of his contention that it must be shown that the concealed condition caused the *accident*, that there can be no *retroactive* dissolution of the employment, and that to condition employment upon the successful passing of a health examination is a violation of Sec. V of the Federal Employers' Liability Act, Title 45 U. S. C. A. § 55. As shown by the opinion of the dissenting judge, the *Daugherty* decision states a most extreme position, a position which must be regarded as rejected by this Court in view of the fact that the lower court in the *Rock* case (*Rock v. Minneapolis R. Co.*, 247 Ill. App. 600—1928) rested its decision in favor of Rock principally on the *Daugherty* case and was re-

versed by this Court (279 U. S. 410—1928). No federal court has ever followed the *Daugherty* decision.

In neither the *Rock* nor *Borum* cases did this Court rule that the concealed condition must be a cause of the accident--such a rule is devoid of logic since it renders the element of fraud superfluous. Nor in these cases did this Court rule that conditioning employment upon the passing of a health examination is a violation of Sec. V. On the contrary this Court in the *Borum* case gave such a requirement its approbation, referring to "defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees" (286 U. S. 451), a public purpose as important to be served in shipping as in railroad operations.

Clearly such a requirement does not, as Sec. V would prohibit, exempt the employer from liability; instead, it is the fraudulent evasion of such requirement by the employee which invalidates the employment contract and thus disqualifies him from invoking liability, since he must be an employee to bring suit either under the Jones Act (*Cosmopolitan Company v. McAllister*, 337 U. S. 783—1948), or under the general maritime law for maintenance and cure (*Fink v. Shepard Steamship Co.*, 337 U. S. 810—1948).

In the event of such fraud the employment relationship is not, as Petitioner argues, dissolved *retroactively*—rather, the employment is invalidated as of the date of the material fraud, as the jury here was correctly charged (Appendix 3). There were sound practical reasons shown by the evidence why physical examinations could not be arranged immediately upon a seaman's joining a Great Lakes vessel, and the only relevance of such circumstance as regards the validity of the defense of fraud was whether respondent in fact *relied* upon the misrepresentations of

Petitioner at the health examination, an issue which was also squarely put to the jury by the instruction given (Appendix 3).

The Shipowners Liability Convention is now cited by Petitioner (Petition, p. 8) but was not invoked in the trial court nor in the Court of Appeals until after oral argument. It applies to "navigation on the high seas only." Parts of the Great Lakes have been excluded from the definition of "high seas," *Bigelow v. Nickerson*, 70 F. 113 (C. A. 7—1895), and the only enabling legislation initiated by Congress in regard to the Convention, H. R. 6881, 76th Congress, First Session, expressly excluded the Great Lakes from its operation. Thus Petitioner failed to establish that the Convention applied at all to the *locus in quo* of the alleged accident.

Moreover, the Convention applies by its terms only to the remedy for maintenance and cure and Petitioner failed to show, as required by Article 2 thereof, that he suffered an "injury occurring between the dates specified in the Articles of Agreement for reporting for duty and the term of the employment." On the contrary, in a holding which was dispositive of the maintenance and cure claim, the trial court found that Petitioner was not injured on the Steamer MILLS. In any event, as shown by *Warren v. U. S.*, 340 U. S. 523 (1951) the Convention was not intended to define American standards of liability with particularity, nor was it "designed to adopt a more strict standard of liability than that which our maritime law provides" (340 U. S. 527). In short, the Convention neither adds to nor detracts from the existing law of the United States on the subject and so is irrelevant in this proceeding.

ALL ISSUES OF NEGLIGENCE TENDERED BY PETITIONER WERE PUT TO THE JURY.

Petitioner distorts the opinion of the Court of Appeals when he says that, in effect, it held that "it is proper to refuse to grant a jury trial on some issues, albeit there be evidence to support them (Petition p. 10).

Actually the Court of Appeals held (257 F. 2d p. 322) that "Under the evidence in this record [the instructions given on the issue of negligence] were adequate"; "Every instruction actually tendered by plaintiff was "given" or, if not, that "plaintiff did not object in compliance with Rule 51 of the Federal Rules of Civil Procedure"; and that since the Trial Court denied defendant's motion for a directed verdict "and submitted the case to the jury for its determination," the decisions in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and *Ferguson v. Moore-McCormack Line, Inc.*, 352 U. S. 521 (1957) "are not even remotely analogous."

Petitioner's testimony as to the cause of the alleged accident (Statement, *supra*, p. 4), leaves no doubt that the sole question for the jury was the condition of the stairs. If the treads were defective or slippery and this condition caused Petitioner to fall, then under the instructions given (257 F. 2d p. 322), respondent was negligent no matter what brought about the condition. No other ultimate questions of fact were presented for the jury's consideration on the issue of negligence.

Petitioner argues that evidence was *offered* that "Other ships have grated steps to carry off water"; that is, "proof of safer methods" (Petition, p. 11), but this argument is not available to Petitioner here because the Court of Appeals found (257 F. 2d p. 321), in its reference to the witnesses Eckert and Merchant and to the rejected photograph (Plaintiff's Ex. 3) that no proper foundation

for such an offer of proof was ever made. Such evidence even if proved was, we contend, clearly irrelevant in the circumstances, but the Court of Appeals found it unnecessary to consider the question because of failure of proof.

Petitioner also argues, citing only the exhibit found by the Court of Appeals to be inadmissible (Petition, p. 11, Plaintiff's Ex. 3) that an issue of negligence was presented because, so his counsel alleges, the handrail did not run the length of the stairway. This argument was not presented to the Court of Appeals and Petitioner hides from this Court the fact that by his own testimony he fell when he was *halfway* down the stairway and at a time when he was holding onto the handrail (R. 66). As to this spurious issue the Trial Court said "There wasn't a scintilla of evidence about that * * * you didn't bring it into the case" (Transcript 1669), and as pointed out by the Court of Appeals, no instruction was ever requested by Petitioner on the issues of negligence which were refused, or if refused, objected to pursuant to Federal Rule 51.

Contrary to Petitioner's statement (Petition, p. 12) evidence that one oiler and one engineer (not two engineers as stated by Petitioner) were temporarily absent from the ship *was* submitted to the jury. But this was an evidentiary rather than an ultimate fact—it had no relevance except as to the condition of the stairway, a subject fully covered by the Court's instructions. On this, Petitioner glibly says that the vessel was unseaworthy because undermanned, but this he never claimed before now, and the statement cannot be true so long as the vessel was manned up to Coast Guard requirements, which she was, as Petitioner knows. Once again this supposed issue was not covered by any requested instruction and was not argued in the Court of Appeals.

The jury could not have a commission to find negligence without a warrant in the evidence, and no such warrant existed or was even sought beyond the instructions which were given.

SINCE PETITIONER FAILED TO CHALLENGE THE TRIAL COURT'S FINDING THAT HE WAS NOT INJURED ON THE MILLS, NO BASIS FOR REVIEW WAS PRESENTED.

At the conclusion of the hearing of Petitioner's claim for maintenance and cure, the Trial Court in its oral opinion said "I am sure he didn't sustain the burden of proof with respect to his injuries * * *" (Appendix 1); and he so found as a fact (Finding of Fact 7, Appendix 2) and for this independent reason denied Petitioner maintenance and cure (Conclusion of Law 2, Appendix 2).

This Court in *McAllister v. U. S.*, 348 U. S. 19 (1954) stated at p. 20:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunal in admiralty cases than that exercised under Rule 52(a) of the Federal Rules of Civil Procedure * * *. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

Since Petitioner did not challenge the fact findings of the Trial Court *at all* he obviously presented no basis for a holding by the Court of Appeals that such findings were "clearly erroneous." Such failure to present *any* basis for reversal of a finding of fact was a fundamental defect and was not a mere technical omission in brief writing

as Petitioner pretends (Petition, p. 13). Thus under the rule of the *McAllister* case, the Court of Appeals was correct in affirming the judgment on Count II.

It could also be pointed out that Petitioner did not challenge, as required under the *McAllister* rule, the finding of the Trial Court that his employment on and after August 15, 1953 was procured through fraud (Finding of Fact 6, Appendix 2) which afforded an additional reason for denial of maintenance and cure (Conclusion of Law 1, Appendix 2) but the Court of Appeals instead of holding, as well it might have, that the judgment on the maintenance and cure count was *res judicata* of Petitioner's right to recover under the Jones Act, granted him a review of all errors alleged to have arisen out of the jury proceedings, including the question of the effect of Petitioner's fraud. The latter question was fully considered by the Court of Appeals and was decided adversely to Petitioner, correctly so we maintain, and thus Petitioner's claim that the Court of Appeals wrongfully limited its review is without substance.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HARLAN L. HACKBERT,
208 South La Salle Street,
Chicago 4, Illinois,
Attorney for Respondent.

ROBERT G. MCCREARY, JR.,
Of Counsel.

APPENDIX 1.

Opinion of the District Court Denying Petitioner's Motion for a New Trial and Denying Petitioner Maintenance and Cure.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, May 13, 1957, at 10:00 o'clock p.m.

APPEARANCES:

JAMES A. DOOLEY, ESQ.,
on behalf of Plaintiff;

HARLAN L. HACKBERT, ESQ., and
ROBERT G. MCCREARY, JR., ESQ.,
on behalf of Defendant.

And thereupon the following proceedings were had herein:

* * * * *

By the Clerk: Sulentich vs. Interlake Steamship Company, plaintiff, motion for a new trial and for trial on maintenance and cure.

By the Court: When was this case?

By Mr. Dooley: I think it concluded on March 22nd.

By Mr. Hackbert: It started about the third.

By the Court: All right. Go ahead.

It started March 8th.

* * * * *

By the Court: On the motion for the new trial, I have just reviewed my diary, and I find that we spent a little more than twelve full days, covering fourteen days, in the trial of this case.

During that time the Court and the jury had full opportunity to observe the plaintiff. He was not a bad looking man, but the jury came to a conclusion that he was not entitled to recover. The Court came to that same conclusion. Maybe the jury and the Court heard too much about him in the fourteen days he was here, twelve days in the fourteen days or parts of fourteen days. I say it was not because he was a bad looking man that I came to the conclusion I did, and I assume it was not because he was a bad looking man that the jury came to the conclusion they did, because he was not a bad looking man.

We just came to the conclusion he had a very bad back before he signed up with the defendant, and the jury probably came to the very strong suspicion that he went up there and signed up, with the deliberate purpose of getting hurt. He had had a bad back since he was a young man, a very young man. That bad back had stayed with him throughout his life.

He had job after job and he kept them a very short time, and his work generally was of a light nature.

He was in the Army seven months, and most of that time in hospitals because of his back.

When he came out of the Army he very promptly applied for compensation, and he got it, ten per cent at first, and later thirty per cent, because of his bad back.

He had had some formal, or he had had opportunities, I will put it, for a formal education. He had attended, I think, a technical school in East Tennessee, but whether the record shows he was graduated I do not now remember.

He had attended a law school and had been graduated therefrom, but had not been admitted to the bar.

He knew his rights, there isn't any question about that.

I think he committed a fraud on the defendant when he signed up with them.

Now, my recollection is, that the physician who first examined plaintiff some weeks after he first signed up left some blanks on the report of that examination. It was testified, and proved to my satisfaction, at any rate, that it was the custom of that physician to leave blanks if the answers were negative to those questions.

On top of that the plaintiff testified that at the time of the physical examination by this Dr. Schuman he signed the report and said, "I hereby certify I have disclosed all previous sickness and injuries, and that I am in good health. I also authorize the examining physician to send this report to the employer."

That is signed by the plaintiff.

Now, then, the practice of this examining physician with respect to leaving blanks indicating a negative answer was supported further by the testimony of his employer, who testified that was the practice of the examining physician, and he produced a large number, perhaps twelve, counsel says, other reports, not for the purpose of proving the truth of anything therein stated, but only for the purpose of proving the practice of the examining physician with respect to the negative answers.

I am satisfied that the plaintiff did commit a fraud on the defendant. Having come to that conclusion, you don't have to take to much of a step to think that he probably planned the whole thing. If you do, you doubt whether he had an accident, the accident he claims to have had, slipping on a stairway.

The evidence shows with respect to that that if he slipped as he claims he slipped on a quarter of an inch of the edge of that step, because the rest of it was covered with an abrasive.

He did have two disks removed. I don't know what else he wants to have; he probably wants to have some vertebras fused or something of that nature, and probably some screws put in his back. That is what they usually want.

Unquestionably he has a bad back, but I don't think the defendant is responsible for it. Probably the athletics he indulged in in his youth were responsible, and maybe his build. It is unfortunate, but I cannot see any reason why the defendant should be blamed for it.

I can't see any reason why fraud, any reason in the nature of things why fraud should not void any contract into which it enters, even if it is a contract of employment. If anybody can point out to me a good reason why that sort of contract should be exempted from the effects of fraud I will be glad to hear it.

These questions and all the other matters suggested by Mr. Dooley, except the question of something going to the jury, were considered at length during the trial of the case from time to time, and the Court then did the best he could with the questions in the light of the education given him by counsel.

The Court doubtless made some mistakes. I think it would be a miracle if the Court didn't during the course of twelve days, make some mistakes, but I don't think any of them are prejudicial.

I cannot remember about a transcript going to the jury. As I remember, there was a complaint offered and received,—a complaint in the case, so far as the evidence showed, the first personal injury case this plaintiff had, wherein the plaintiff through his counsel complained of a back injury. I think, I am not sure but I think there was a transcript of the plaintiff's evidence in that case received.

Is that the fact?

By Mr. McCreary: That is right, your Honor.

By the Court: That was the transcript of the testimony of the plaintiff.

If I did let it go to the jury I cannot see what would be prejudicial about that. That was the plaintiff's testimony of what happened to his back back there in his early young manhood. If I let the complaint go to the jury I don't see how they would be prejudicial. There in the most solemn manner a man can state he stated through his counsel he had been injured in a number of ways.

I am satisfied that the plaintiff committed fraud upon the defendant by failing to disclose his physical condition. I do not think he sustained the burden of proof on the question of negligence on the part of the defendant. I am sure he didn't sustain the burden of proof with respect to his injuries, and I do not think that there is or that there was error committed which was prejudicial to the plaintiff.

Now, having come to the conclusion I have, on the motion for the new trial I am not going to cast doubt on the jury's thinking.

It may be assumed the jury said there was no negligence on the part of the defendant or may have said that the plaintiff was not injured. Again, it may have said he committed fraud in the employment contract, or it may have said all of those things—I am not going to cast doubt on any one of them by making allowance for maintenance and cure.

I am sure he committed fraud. Accordingly, there will be no allowance for maintenance and cure.

You may bring in findings of fact, conclusions of law and a judgment order.

* * * * *

APPENDIX 2.

Findings of Fact and Conclusions of Law of the District Court.

The Court now makes the following Findings of Fact and Conclusions of Law in regard to the Second Cause of Action alleged in plaintiff's complaint:

1. On July 11, 1953 plaintiff signed Articles of Agreement aboard defendant's Steamer D. O. Mills whereby it was agreed that his employment was subject to health examination by a physician furnished by the vessel and that in case he failed to pass such examination his employment would cease.

2. Prior to going aboard the Steamer Mills plaintiff had a long history of chronic back trouble accompanied by the medically recognized signs and symptoms of a herniated disc, which history included the following events:

(a) In 1941 plaintiff injured his back while high-jumping as a student at Tennessee Tech. He again injured his back in 1941 while working at American Steel & Wire Company in Duluth;

(b) In 1942 he injured his back while working at Reliance Electric Company, Cleveland, Ohio;

(c) He was inducted into the United States Army on September 23, 1942 and received a medical discharge therefrom on May 12, 1943 because of chronic low back and sciatic pain, 6 months of his 8 months service being spent in Army Hospitals because of back pain;

(d) On June 23, 1943 plaintiff applied to the Veterans Administration for disability compensation because of continuing back pain and began to receive compensation based first on a 10% disability and later, commencing on September 29, 1950 when his condition was diagnosed as a ruptured intervertebral disc,

based on a 30% disability, which compensation plaintiff continued to receive while he was aboard the Steamer D. O. Mills in 1953;

(e) Plaintiff had numerous jobs between 1943 and 1953, mostly of a clerical nature, a number of which he gave up because of back trouble and during none of which he was entirely free of back pain;

(f) During the 10 year period prior to going aboard the Steamer Mills, plaintiff requested and received numerous examinations and treatments from Veterans Administration doctors and treated himself at home with a heat lamp because of pain in his low back and legs. On September 29, 1950 his condition was diagnosed as a ruptured intervertebral disc, he continued to have back pains and treatment therefor periodically throughout 1951 and 1952 and in April, May and June of 1953 he was having back pain and was receiving heat treatments therefor both from the Veterans Administration and by himself at home.

3. On August 15, 1953 plaintiff received a physical examination aboard the said Steamer D. O. Mills at which time in response to direct questions by the examining doctor he knowingly denied having had any history of injuries, back pain, discharge from Military Service or receipt of compensation from any source because of sickness or accident. Further, although plaintiff did not disclose any previous injuries, he knowingly signed the examination report in the following form:

"I hereby certify I have disclosed all previous sickness and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer.

/s/ Stephen A. Sulentich Signature"

4. Plaintiff attended college and had graduated from law school although he had not been admitted to the Bar.

5. The concealments and misrepresentations by plaintiff from and to the examining doctor on August 15, 1953 were knowingly made, were material to the risk of physical disability during employment on said vessel and were relied upon by defendant, and plaintiff would not have been permited to remain aboard the vessel after August 15, 1953 if the true state of facts had been disclosed by him to the examining doctor.

6. Defendant, The Interlake Steamship Company, has sustained the burden of proving that plaintiff's employment on and after August 15, 1953 was procured through his fraud and misrepresentations.

7. Plaintiff has failed to sustain the burden of proving that he was injured aboard the Steamer D. O. Mills on August 17, 1953.

CONCLUSIONS OF LAW.

1. Plaintiff's employment on and after August 15, 1953 was null and void and of no effect and he is, therefore, barred from any claim for maintenance and cure as asserted in his complaint.

2. Plaintiff sustained no injury on August 17, 1953 and, therefore he is not entitled to any maintenance and cure as asserted in his complaint.

3. The complaint is dismissed.

/s/ JOHN P. BARNES,
Chief Judge.

May 20, 1957.

APPENDIX 3.

Instruction Submitted by the Trial Court to the Jury.

If you believe from the preponderance of the evidence (1) that as one of the terms and conditions of his initial employment on July 11, 1953, the plaintiff's employment was subject to a health examination, and in case he failed to pass such examination, his employment should cease; (2) that upon the health examination on August 15, 1953 the plaintiff knowingly misrepresented to or concealed from the examining physician the fact that he had sustained previous injuries and suffered back pain, or that he had been discharged from the military service for physical disability or that he had been and was then receiving veteran's disability benefits based on a rating of 30% disability; (3) that such misrepresentation or concealment was material; and (4) that such misrepresentation or concealment was relied upon by the defendant, and that plaintiff would not have been permitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then plaintiff was not as a matter of right defendant's employee on August 17, 1953 at the time of his alleged accident, and he is not entitled to recover under the statute under which this action is brought, and you should find the defendant not guilty. You are further instructed that the burden of proof is upon the defendant to prove by the preponderance of the evidence each of the four above mentioned elements.

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NOV 8 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407

STEPHEN A. SULENTICH,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY.

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Counsel for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

The Importance of Certiorari Here. 1

CITATIONS.

Casso v. Penn. R. Co., 219 F. 2d 303 2

Ferguson v. Moore-McCormick Lines, 352 U.S. 550 .. 3

Minneapolis, Etc. R. Co. v. Borum, 286 U.S. 447 2

Palmer v. Hoffman, 318 U.S. 109 4

Payne v. Dougherty, 283 F. 383 2

Rogers v. Mo. P. Ry. Co., 352 U.S. 500 3

Scotland County v. Hill, 112 U.S. 183 5

Sea Shipping Co. v. Sieracki, 328 U.S. 85 2

Wantland v. I. C. R. R. Co., 237 F. 2d 921 4